UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1405

BEVERLY HEALTH & REHABILITATION SERVICES, INC. AND
BEVERLY ENTERPRISES — PENNSYLVANIA, INC.
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

DISTRICT 1199P, SEIU, AFL-CIO
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Beverly Health & Rehabilitation Services, Inc. and Beverly Enterprises — Pennsylvania, Inc.[1] to

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[1] It is undisputed that Beverly Health and Rehabilitation Services, Inc., its regional offices, individual facilities, and subsidiaries including Beverly Enterprises — Pennsylvania constitute a single employer.

review, and the cross-application of the National Labor Relations Board to enforce, a Decision and Order of the Board. The Board's order issued on August 27, 2001, and is reported at 335 NLRB No. 54 (A 27-85).[2] District 1199P, SEIU, AFL-CIO ("the Union") has intervened on behalf of the Board.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that review of Board orders may be sought in this Court. Beverly filed its petition for review on September 19, 2001. The Board filed its cross-application for enforcement on November 8, 2001. Both were timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders. The Board's order is final with respect to all parties under Section 10(e) and (f) of the Act.

STATEMENT OF ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its numerous uncontested findings that Beverly committed violations of the Act.

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[2] Record references in this final brief are to the appendices: "A" refers to the deferred appendix and "SA" refers to the supplemental deferred appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's finding that Beverly violated Section 8(a)(3) of the Act by refusing to reinstate unfair labor practice strikers.

3. Whether substantial evidence supports the Board's findings that Beverly violated Sections 8(a)(1) and (3) of the Act by interfering with employees' rights and discriminating against licensed practical nurses at its Haida facility, and whether Beverly failed to show that the LPNs were supervisors under the Act.

4. Whether substantial evidence supports the Board's findings that Beverly violated Section 8(a)(5) and (1) of the Act by making numerous unilateral changes to employees' terms and conditions of employment.

5. Whether substantial evidence supports the Board's findings that Beverly violated Section 8(a)(1) of the Act by videotaping picketers and by advertising for replacement employees at higher than existing wages.

6. Whether the Board acted within its broad discretion in ordering corporatewide relief.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are reproduced in the Addendum to Beverly's brief.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Prior Litigation and Procedural History of the Instant Case

This case is known as "*Beverly IV*." *Beverly I, II,* and *III* similarly involved consolidated unfair labor practice cases arising from Beverly's conduct at various nursing homes. In *Beverly California Corp.*, 310 NLRB 222 (1993) ("*Beverly I*"), the Board found that Beverly committed over 130 unfair labor practices at 33 facilities. The Second Circuit enforced the Board's order with respect to all but three violations. *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580 (1994) (denying enforcement of corporatewide order).

In *Beverly II*, the Board found that Beverly committed approximately 78 violations of the Act at 17 facilities. 326 NLRB 153 (1998); *Beverly California Corp.*, 326 NLRB 232, 237 (1998) ("*Beverly III*"). In *Beverly III*, the Board found that Beverly committed another 28 unfair labor practices at 9 facilities. 326 NLRB at 237. *Beverly II* and *III* were consolidated for review before the Seventh Circuit, which upheld all but 3 of the unfair labor practice findings. *Beverly California Corp. v. NLRB*, 227 F.3d 817 (7th Cir. 2000) ("*Beverly II-III*"), *cert. denied*, 533 U.S. 950 (2001). The court also upheld the Board's imposition of a corporatewide cease-and-desist order along with a requirement that remedial notices to employees be posted at each of Beverly's facilities.

In *Beverly II-III*, the court initially remanded to the Board the tasks of redrafting the corporatewide order and remedial notice to remove unnecessary detail, and of determining which part of the notices should be posted at the particular facilities involved versus other facilities not the subject of unfair labor practices. *Id.* at 847. It subsequently granted summary enforcement to the Board's order on remand. *NLRB v. Beverly California Corp.*, 25 Fed.Appx. 427 (7th Cir. 2001). Among the 3 cases, *Beverly I*, *II*, and *III*, Beverly committed a total of approximately 240 unfair labor practices — including coercive conduct, discrimination, and refusals to bargain in good faith — at 54 facilities in 18 states. *Beverly III*, 326 NLRB at 237.[3]

In the instant case, the administrative law judge conducted a bifurcated hearing, with the first phase dedicated to the merits of the unfair labor practice charges.[4] After the issuance of the judge's decision on November 26, 1997, finding merit to most of the complaint allegations, the parties litigated the single-employer issue described above, p. 1 n.1, and the question of what remedies were

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[3] Nine of the facilities involved in the instant case were also the loci of unfair labor practices in *Beverly I*; 4 were involved in *Beverly II*; and 1 in *Beverly III.*

[4] While that hearing was proceeding, the District Court of the Western District of Pennsylvania issued an injunction, pursuant to Section 10(j) of the Act (29 U.S.C. 160(j)), requiring Beverly to reinstate employees who struck in protest of unfair labor practices, and to replace the Union's bulletin boards. *Kobell v. Beverly Health & Rehabilitation Servs., Inc.*, 987 F.Supp. 409 (W.D. Pa. 1997), *enforced*, 142 F.3d 428 (3d Cir. 1998) (table).

warranted. (A 45, 69.) On November 30, 1999, the judge issued a supplemental decision finding that the alleged entities constituted a single employer. He further found that, although other extraordinary remedies were unnecessary, Beverly's repeated unlawful conduct warranted a corporatewide cease-and-desist order and notice to employees. (A 81.) The Board upheld the judge's findings in almost all respects. (A 27-38.)

B. Facilities and Bargaining Units Involved

Beverly operated approximately 730 nursing homes in 35 states and the District of Columbia.[5] (A 70; 1488-91, 1040-43.) The instant case involved numerous unfair labor practices at 20 facilities in Pennsylvania.[6] At each of those facilities, the Union represented bargaining units of service and maintenance employees, including certified nurses assistants (CNAs). At nine facilities, it also represented units of licensed practical nurses (LPNs); all but one of those had a separate collective-bargaining agreements covering the LPNs.

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[5] At the time of the initial hearing, Beverly operated 950 facilities, but by the supplemental hearing, that number was 730. Currently, Beverly has even fewer facilities due to sales. The Board's regional office advised counsel that, in *Beverly II-III*'s compliance proceedings, Beverly reported that it had 497 facilities as of February 7, 2002.

[6] Those facilities are known as Monroeville, Clarion, Fayette, Franklin, Grandview, Haida, Meadville, Meyersdale, Mt. Lebanon, Murray, Richland, William Penn, Reading, Lancaster, Blue Ridge, Caledonia, Camp Hill, Carpenter, Stroud, and York.

The collective-bargaining agreements at 18 of the facilities expired on November 30, 1994, and the contracts for service and maintenance units at Grandview and Lancaster expired on December 31. (A 46.) The unfair labor practices in this case involved coercive conduct, discrimination, and failures to bargain in good faith — including numerous unilateral changes in terms and conditions of work — during the period the parties were negotiating successor contracts. Given the scope of this case, space constraints, a desire to avoid repetition, and the fact that most of the contested issues in this case largely turn on questions of law, the facts of those issues are summarized below in the relevant sections of the Argument.

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the facts and arguments discussed below, the Board (Chairman Hurtgen and Members Liebman and Walsh) found that Beverly committed numerous violations of Sections 8(a)(1), (3), and (5) of the Act. It issued a corporatewide order against Beverly to cease and desist from the unfair labor practices found and from violating the Act "in any other manner." (A 35-36.) Affirmatively, the Board's order requires Beverly to make whole all employees, including strikers, affected by its unlawful conduct; to rescind its unilateral changes, upon request; and to bargain with and provide relevant information to the Union, upon request. Additionally, the Board ordered Beverly to post one of two

versions of a remedial notice to employees at each of its facilities: one for the 20 facilities directly involved in this case and at the offices overseeing those facilities and another to be posted at each of Beverly's other facilities and offices nationwide. (A 35, 40-44.)

SUMMARY OF ARGUMENT

The Board is entitled to summary enforcement of its numerous uncontested findings that Beverly violated Sections 8(a)(1), (3), and (5) of the Act. Substantial evidence also supports the Board's finding that Beverly unlawfully refused to reinstate and make whole over 450 employees who struck in protest of unfair labor practices. The Board reasonably rejected as contrary to established precedent, Beverly's defense that the Union's strike notices were invalid under Section 8(g) of the Act. The Board's decision is supported by principles of statutory construction, the legislative history, and other policy considerations.

The facts underlying the Board's findings that Beverly coerced and discriminated against LPNs at its Haida facility are undisputed. The Board reasonably rejected Beverly's sole defense — that the Haida LPNs were supervisors, not employees — because Beverly failed to show that the LPNs exercised any supervisory authority with independent judgment.

Substantial evidence also supports the Board's findings that Beverly unlawfully implemented numerous unilateral changes. For example, with respect

to health insurance, Beverly did not bargain in good faith when it did not notify the Union until after it had chosen replacement coverage. Beverly's denial of access to union representatives and removal of union bulletin boards was also unlawful; it is well established that contract provisions governing those matters are terms and conditions of employment that continue even after contract expiration. Beverly's argument that its property rights trump the Union's right to represent its members lacks support in case law or policy. The facts underlying numerous other unilateral changes are undisputed. The Board and courts repeatedly have rejected the argument, made here by Beverly, that a management rights clause survives contract expiration and permits post-expiration changes. Indeed, a recent Sixth Circuit decision involving the identical parties, facts, and arguments, precludes a contrary finding here.

Substantial evidence also supports the Board's finding that Beverly interfered with employees' rights by videotaping their picketing. Beverly's defense — that it erroneously believed the picketers were trespassing — consistently has been rejected in other cases. Beverly also coerced employees by advertising for striker replacements at higher than existing wages. Consistent with precedent, the Board reasonably found the advertisements were designed to undermine the Union, particularly in the context of Beverly's numerous other unfair labor practices.

Finally, the Board acted well within its broad discretion in imposing a corporatewide cease-and-desist and notice-posting order given Beverly's history as a recidivist and the serious unfair labor practices it committed here. The fact that Beverly's union animus is embedded in its corporate structure justifies corporatewide relief.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). The Board's interpretation of Act will be upheld as long as it is rational and consistent with the statute. *NLRB v. United Food and Commercial Workers Union Local 23*, 484 U.S. 112, 123 (1987). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.*, 340 U.S. at 488. Standards of review specific to particular issues are stated in the relevant sections of the Argument.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS

In its brief, Beverly does not challenge most of the Board's findings, including the following violations.

Section 8(a)(1) Violations

Beverly does not dispute that the following unlawful conduct coerced and interfered with employees' exercise of their statutory right to collective bargaining.

- Haida Director of Nursing Lisa Settlemeyer solicited grievances and implicitly promised to remedy them. (A 52.)
- Haida supervisors engaged in surveillance of union activity, including videotaping employees' picketing. (A 52.)
- Meadville Administrator John Ferritto called employees who sent a complaint letter to the regional office "assholes" and "fucking idiots." He told them that union supporters should "get Vaseline and bend over because [they were] going to get screwed." He also threatened them with surveillance. (A 28, 52-53.)
- Meyersdale guards and supervisors engaged in surveillance, including videotaping employees' candlelight vigil. (A 53.)
- Murray guards and supervisors engaged in surveillance, including videotaping employees' picketing. (A 53.)

- Richland Administrator John Poltrack removed union material from the employee breakroom. He and Richland Director of Nursing Ron Lindrose threatened employees with discipline if they brought union material into the facility. (A 30, 53-54.)
- William Penn housekeeping supervisor Roy King ordered an employee to remove union insignia from her cart. (A 54.)
- William Penn Dietary Service Manager Gwen Miller solicited employee resignations from the Union, interrogated employees, and threatened to reduce employees' hours if they went on strike. (A 54.)
- Caledonia Administrator Maria Spinazzola threatened a union steward with retaliation for complaining about working conditions. The Board also found that implementation of that threat violated Section 8(a)(5) and (1) of the Act. (A 55.)
- York Director of Nursing Caroline Nelson prohibited employees from wearing union insignia. (A 63.)

Section 8(a)(3) and (1) Violations[7]

Beverly does not contest that it took the following actions in response to employees' union activity.

- Suspension of Haida employee Connie Kollar for four days (A 55)
- Change in William Penn employee Ruth Pilarski's break time (A 55)
- Reduction of William Penn CNAs' hours (A 56)
- Conversion of Monroeville and Fayette LPNs to supervisors and revision of the disciplinary policy to make them responsible for CNAs' errors. That was also a Section 8(a)(5) and (1) violation. (A 56.)
- Reduction of Grandview employee Beverly Higbee's hours (A 56-57, n.43)
- Discipline, suspension, and discharge of Grandview employee Sharon Proper (A 57-58)

Section 8(a)(5) and (1) Violations

Beverly does not dispute that it failed to bargain in good faith with the Union by taking the following actions.

- Unilateral changes to posting of work schedules at Franklin (A 49)

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[7]A violation of Section 8(a)(3) or 8(a)(5) of the Act results in a "derivative" violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

- Failure to notify Union of discharges and to post new CNA position and bids for newly created shift; failure to bargain over transfer of employee to different shift at Meadville (A 29 n.8, 30, 49.)
- Unilateral conversion of bargaining unit position to supervisory at William Penn (A 49)
- Unilateral conversion of employees to supervisors at Monroeville and Fayette (A 56)
- Unilaterally changing hours and canceling vacations at Grandview (A 49, 56) [8]
- Failure to notify and bargain with the Union over the layoff of employees at Meadville and Richland (A 29 & n.8, 30)
- Failure to notify and bargain with the Union over reduction of hours at Fayette and Camp Hill (A 30)
- Failure to notify and bargain with the Union over safety issues, transfer of an employee, reinstatement of employees to prior positions, reorganization of the dietary department, and changes to personal and vacation days at Meadville (A 49)

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[8] Beverly's management rights defense, described below, cannot apply to changes involving the LPNs at Grandview, where there was no contract covering them at the relevant time.

- Bypassing the Union and dealing directly with employees at Haida and Caledonia (A 49-50)
- Bypassing the Union and dealing directly with employees, refusal to bargain, and refusal to provide information at Fayette (A 56)
- Refusal to provide information at Clarion, Fayette, Grandview, Meadville, Carpenter, and York (A 50-51)
- Refusal to process grievances at Carpenter (A 52)
- Refusal to allow an employee to serve as union representative at Grandview (A 56)

By not contesting those unfair labor practice findings, Beverly waived any defenses to them, and the Board is entitled to summary enforcement of the relevant portions of its orders. *See Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990). *See also* Fed.R.App.P. Rule 28(a)(9)(A). Moreover, those violations do not disappear simply because they have not been contested. Rather, they remain in the case, "lending their aroma to the context in which the [contested] issues are considered." *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1315 (7th Cir. 1991) (en banc). They also demonstrate Beverly's steadfast union animus and provide significant support for the Board's determination that corporatewide relief is necessary.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT BEVERLY VIOLATED SECTION 8(a)(3) OF THE ACT BY REFUSING TO REINSTATE UNFAIR LABOR PRACTICE STRIKERS

The facts underlying this issue are undisputed. On April 1, 1995, hundreds of employees at 15 facilities went on strike to protest Beverly's numerous unfair labor practices. After the three-day strike, they made unconditional offers to return to work. Beverly, however, refused to offer at least 450 employees immediate reinstatement to their former positions as required. (A 64.)

A. Applicable Section 8(a)(3) Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) provides that employers may not "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Employees who strike in protest of unfair labor practices are entitled to full reinstatement to their former positions upon their unconditional offer to return to work, even if their employer must dismiss replacements hired during the strike. *NLRB v. International Van Lines*, 409 U.S. 48, 50-51 (1972). Accordingly, an employer violates Section 8(a)(3) of the Act if it fails to offer immediate reinstatement to unfair labor practice strikers who have made unconditional offers to return to work. *Id. Accord General Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308, 1311 (D.C. Cir. 1991).

Here, Beverly concedes (Br 12-13) that the employees engaged in an unfair labor practice strike and made unconditional offers to return to work. It argues (Br 21-29), however, that the strikers lost the Act's protection because the Union's strike notices were invalid under Section 8(g) of the Act (29 U.S.C. §158(g)). As shown below, the Board reasonably found that the strike notices fully complied with Section 8(g) and, therefore, properly found that Beverly violated Section 8(a)(3) of the Act by not immediately offering striking employees reinstatement to their former positions. (A 63-64.)

B. The Union Adhered to Established Section 8(g) Notice Requirements

Section 8(g), added as part of the 1974 amendments to the Act granting the Board jurisdiction over nonprofit health care institutions, requires a labor organization to give written notice to a health care employer at least 10 days before engaging in any strike, picketing, or other concerted refusal to work.[9] Employees of health care institutions have the same right to strike as other employees, but the notice provision gives health care employers the time to arrange for uninterrupted

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[9] Section 8(g) states:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, no less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention . . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

patient care. Senate Comm. on Labor and Public Welfare, S. Rep. No. 93-766, at 4 (1974) ("*Senate Report*"), and H.R. Rep. No. 93-1051, at 5 (1974) ("*House Report*"), *both reprinted in* 1974 U.S.C.C.A.N. 3946, *and in* Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, 11, 273 (Comm. Print 1974) ("*Legislative History*").

Congress cautioned the Board to apply "the rule of reason" and "'to act in a reasonable manner consistent with the Committee's intent as stated in its Report'" in considering Section 8(g) issues. *Greater New Orleans Artificial Kidney Center*, 240 NLRB 432, 435 (1979) ("*Bio-Medical*") (quoting *Legislative History* at 410). Accordingly, strikes need not begin exactly 10 days from service of the notice. Rather, since the passage of the health care amendments, the Board has consistently adhered to the rule, first articulated in *Bio-Medical*, that the union must serve notice on the employer at least 10 days prior to the strike and, if it wishes to postpone the start time of the strike, it must give the employer 12-hours' notice of the actual commencement of the strike; in any event, it cannot postpone action by more than 72 hours. The union may postpone the strike by written agreement or unilaterally where it meets those deadlines. *Bio-Medical*, 240 NLRB at 435 (citing *Senate Report* at 4, *House Report* at 5). *See also Bricklayers & Allied Craftsmen Local 40 (Lake Shore Hospital)*, 252 NLRB 252, 253 (1980);

District 1199-E Hospital & Health Care Employees (Federal Hill Nursing Center), 243 NLRB 23, 24-25 (1979).

Beverly admits (Br 12) that, on March 14 and 15, the Union sent notices to the administrators of the fifteen involved homes advising them that a strike would take place at those facilities on March 29 at 7:00 a.m.[10] It does not dispute that those notices comply, in form, with Section 8(g)'s requirements. It also agrees (Br 12-13) that, on March 27, the Union sent letters to the same addressees stating that the Union would delay the strike by 71 hours, to 6:00 a.m. on April 1. As the Board reasonably found (A 63-64), those notices also fall within *Bio-Medical*'s dictates.

C. There is No Merit to Beverly's Argument that Postponement of a Strike Requires the Employer's Written Agreement

Beverly does not dispute that the Union's notices were sufficient under established Board precedent. Rather, it argues (Br 22-29) that the rule set forth in *Bio-Medical*, allowing a union to unilaterally postpone a strike, is wrong, because Section 8(g) mandates that a union must secure the employer's written agreement for any postponement. Beverly's restrictive reading of 8(g) misinterprets the statutory text, ignores established principles of statutory construction, and

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[10] The Union later notified Beverly that the strike would last 3 days.

disregards legislative history and policy considerations. In addition, Beverly's own conduct demonstrated a view that comported with Board precedent.

1. *Chevron* Deference and the Ambiguous Text of Section 8(g)

First, the Board's rule on strike postponement is entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). There, the Court stated that if "Congress has directly spoken to the precise question at issue," then "the [reviewing] court as well as the [administrative] agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by . . . an agency." *Id.* at 843-44.

Here, Section 8(g) is ambiguous to the extent that it does not state whether written agreement is the exclusive means of postponing a strike, as described immediately below. As we then show, the Board's interpretation of the Act, relying on legislative history for guidance, was reasonable and, therefore, is entitled to enforcement under *Chevron*. *See, e.g., Wackenhut Corp v. NLRB*, 178 F.3d 543, 553-57 (D.C. Cir. 1999) (deferring to Board interpretation of ambiguous statutory provision).

Section 8(g) neither exhaustively lists the means of postponing a strike nor prohibits a union from doing so unilaterally. In providing that "[t]he notice, once

given, may be extended by the written agreement of both parties," it nowhere declares that written agreement is the *exclusive* mechanism for postponing a strike. *See Bio-Medical*, 240 NLRB at 434. In these circumstances, the Board reasonably found the provision ambiguous.

That ambiguity is further demonstrated by the fact that Beverly does not rely on the precise text of Section 8(g), but instead urges the Court to rewrite the last sentence to state that "[t]he notice, once given, may be extended *only* by the written agreement of both parties." *See Alcan Aluminum Corp. v. U.S.*, 165 F.3d 898, 902 (Fed.Cir. 1999) (courts may not add to a statute). Beverly's argument (Br 25-26) implicitly relies on the canon of statutory construction, *expressio unius est exclusio alterius* (the expression of one is the exclusion of others), which the Court has rejected as "inappropriate in the administrative context." *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991). *See also Cheney Railroad Co., Inc. v. ICC*, 902 F.2d 66, 68-69 (D.C. Cir. 1990).

Moreover, contrary to Beverly's contention (Br 25-26), the use of the word "may" does not exclude the possibility that the notice can be extended by other means. If Congress had intended "may" to mean "only," it would have so stated. *See McCreary v. Offner*, 172 F.3d 76, 83 (D.C. Cir. 1999) ("may" means may); *U.S. v. Mass. Water Resources Authority*, 256 F.3d 36, 51 (1st Cir. 2001) ("When Congress uses the permissive 'may' . . . it is 'eminently reasonable' to presume

that the choice of verbiage is a deliberate one, and that, in the context of that statute, 'may' means may." (citation omitted)). Furthermore, even if Beverly's interpretation is a plausible construction of Section 8(g), it is not the only one. It therefore cannot displace the Board's interpretation. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 401 (1996) (rejecting employer's "plain language" argument offering "a plausible, but not an inevitable, construction" of statute).

2. Legislative History and Policy Considerations

The Board's interpretation of Section 8(g) is entitled to *Chevron* deference because it heeds Congress' intent, clearly expressed in the legislative history. As an initial matter, Beverly's argument (Br 23-24) that the Board should not have consulted the legislative history must be rejected. This Court has stated that, in "[f]ollowing the path that *Chevron* marked, we ask, first, whether the text or *legislative history* of the Act reveals any congressional intention on the 'precise question at issue'; if so, we 'must give effect to the unambiguously expressed intent of Congress.'" *West Coast Sheet Metal, Inc. v. NLRB,* 938 F.2d 1356, 1360 (D.C. Cir. 1991) (quoting *Chevron*, 467 U.S. at 842-43) (emphasis added).

Here, although the statute does not answer the question of strike extensions, the legislative history does, and the Court must look to it as the first step in the

Chevron analysis.[11] *See Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1127 (D.C. Cir. 1995) (court may refer "to statutory design and pertinent legislative history [that] may often shed new light on congressional intent, notwithstanding statutory language that appears 'superficially clear'"); *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 147 n.3 (5th Cir. 1983) (court "may examine the relevant legislative history of a particular statute in order to ensure that its literal application fulfills manifest congressional intent"). Specifically, as explained above (pp. 17-18), both the Senate and House Committee Reports provide clear guidance for unilateral extension of a strike date. Beverly offers no sound justification for jettisoning the Board's longstanding construction and adopting an interpretation that contravenes the undisputed legislative history, particularly where it was not prejudiced by the postponement of the strike, as discussed below. *See District 1199-E Hospital & Health Care*

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[11] The postponement of strikes is just one of a number of accepted rules pertaining to Section 8(g) not explicitly contained in its language. *See, e.g., California Nurses Assoc.*, 315 NLRB 468 (1994) (hiatus in picketing necessitates another notice); *Painters Local No. 452*, 246 NLRB 970 (1979) (non-health care employees working for a separate employer at a neutral health care institution need not provide that institution with strike notice); *Retail Clerks Union Local 727*, 244 NLRB 586 (1979) (rules for calculating the time limits); *Kapiolani Hospital*, 231 NLRB 34 (1977) (unrepresented individual employees need not provide notice), *enforced*, 581 F.2d 230 (9th Cir. 1978).

Employees (Federal Hill Nursing Center), 243 NLRB 23, 24-25 (1979) (discussing policy and legislative history)

In contending (Br 27-28) that no court has approved the *Bio-Medical* rule, Beverly misconstrues *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238 (2d Cir. 1990). There, the union orally gave the employer 6 days' notice of a 1-day postponement of a strike. The Board did not reach the postponement issue because it upheld the judge's alternative rationale, that the employer's unfair labor practices excused the union from the notice requirements. *See Council's Center for Problems of Living*, 289 NLRB 1122, 1122 n.3 (1988). As Beverly admits (Br 27), the Second Circuit denied enforcement of the Board's order because it concluded that the union did not provide 12-hours' *written* supplementary notice of the strike's actual start time. *Washington Heights*, 897 F.2d at 1246-47. Thus, contrary to Beverly's assertion, the court accepted the principle of unilateral extension and itself relied on the legislative history, which is the source of the 12-hour supplementary notice that it found lacking. Otherwise, it simply would have held that a union may not unilaterally postpone a strike.

The Board, heeding Congress' admonition to apply a rule of reason, is also mindful of policy considerations. *Bio-Medical*, 240 NLRB at 435 (quoting *Legislative History* at 409). Representatives Ashbrook and Thompson noted that

"should the labor organization be in violation of Section 8(g), the employees would then, according to statute, lose their status as 'employees'. Consequently, the reasonableness of the Board in applying the intent of the Committee to the facts is of major importance." *Legislative History* at 410 (quoted in *Bio-Medical*, 240 NLRB at 435). As a practical matter in this case, overturning *Bio-Medical* would strip hundreds of employees — who adhered to established rules — of their right to reinstatement to their former positions and backpay. (A 64 n.68).

3. Beverly's Conduct Demonstrated Acceptance of the *Bio-Medical* Rule

Finally, the record demonstrated that both parties understood that the Union could postpone the strike. The Union plainly relied on the established rules for postponing the strike, which have been accepted by health care institutions and unions that have worked under them without question for over 20 years. Similarly, Beverly's own internal documents demonstrate that it also understood that the Union could extend the strike date, and it prepared for that instance. Indeed, its strike contingency plan stated, "if the strike does not begin at the appointed time, it must begin within a reasonable period thereafter, which has been determined to be within 72 hours of the appointed time, in which case the union should provide at least twelve hours' notice of the intended strike commencement time." (SA 30.) Beverly's managers also advised the administrators of individual homes that the

Union could extend the original strike date by up to 72 hours. (SA 27-28, A 363-66.)

Beverly's argument (Br 26-27) regarding the difficulties of obtaining replacement employees is unavailing. It was not prejudiced by the 71-hour postponement. In fact, on the final day of the strike, Beverly boasted:

> All of our facilities in Pennsylvania remained open, and all health care services continued to be provided. Our facilities are functioning in a business as normal fashion . . . . We were fully prepared to handle this strike, and had lined up qualified, caring workers to replace those who did not show up for work.

(SA 53-56.) Thus, Beverly cannot ignore established precedent that it itself acknowledged, and escape its obligation to reinstate and make whole hundreds of employees based on its overly technical reading of the statute.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT BEVERLY VIOLATED SECTIONS 8(a)(1) AND (3) OF THE ACT BY INTERFERING WITH EMPLOYEES' RIGHTS AND DISCRIMINATING AGAINST LICENSED PRACTICAL NURSES AT ITS HAIDA FACILITY AND THAT BEVERLY FAILED TO SHOW THAT THE LPNS WERE SUPERVISORS UNDER THE ACT

A. Background and Violations Involved

Beverly concedes (Br 14) the facts underlying the violations, briefly described here. Licensed practical nurses (LPNs) Diane McNulty and Sara

Sharbaugh were active in the organizing campaign at Beverly's Haida facility.[12] On March 4, 1996, Beverly refused McNulty's request to change her schedule and attend contract negotiations. On March 9, Haida Administrator Pauline Formeck warned McNulty that she was prohibited from discussing the Union at any time and from wearing union insignia. McNulty agreed to stop wearing union insignia, but not to stop discussing the Union. Formeck suspended and subsequently discharged McNulty and repeated the scenario with Sharbaugh. She also warned other LPNs of the restriction on union insignia and discussion pursuant to directions from Director of Associate Relations Wayne Chapman. (A 58-59; 1252-69, 1271-76, 1308-11, 376-408.)

Based on those undisputed facts, the Board found that Beverly had violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by prohibiting LPNs at its Haida facility from talking about the Union and from wearing union insignia anywhere in the facility, and by interrogating them about their union activities. *ITT Industries, Inc. v. NLRB*, 251 F.3d 995, 1006 (D.C. Cir. 2001); *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 946 (D.C. Cir. 1999); *Beverly II-III*, 227 F.3d at 831. The Board

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[12] After filing a petition in June 1997 and prevailing in the Board-conducted election, the Union was certified to represent the Haida LPNs. Beverly refused to bargain, claiming that the LPNs were supervisors and therefore did not constitute an appropriate bargaining unit. The Sixth Circuit reversed the Board, concluding that, at the time in question, the Haida LPNs were supervisors. *Beverly Health &*

also found that Beverly violated Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) by refusing to allow McNulty to change her schedule and by discharging McNulty and Sharbaugh because they would not renounce their support for the Union. (A 63.) *See Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 671, 675 (D.C. Cir. 2001) (discharge and refusal to allow change of vacation day).

The Board reasonably rejected (A 27-28 n.3, 58-63) Beverly's sole defense (Br 14, 45) — that the Haida LPNs were supervisors, not employees, under Section 2(11) of the Act — and therefore were not entitled to the Act's protection. As we show below, Beverly failed to demonstrate that, at the time of the unfair labor practices, the LPNs exercised any supervisory authority excluding them from coverage under the Act.

B. Applicable Supervisory Principles

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes from the definition of the term "employee" "any individual employed as a supervisor." Section 2(11) of the Act (29 U.S.C. § 152(11)) defines the term supervisor as:

Rehabilitation Services, Inc. v. NLRB, 181 F.3d 99 (6th Cir. 1999) (table). See further discussion below, pp. 38-39.

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Accordingly, individuals are statutory supervisors "if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13 (2001) (citation omitted). In *Kentucky River*, the Supreme Court held that "the statutory term 'independent judgment' is ambiguous with respect to the *degree* of discretion required for supervisory status," and that "[i]t falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies." *Id.* at 713 (emphasis in original). *See also VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999). The burden of demonstrating employees' Section 2(11) supervisory status rests with the party asserting it. *Kentucky River*, 532 U.S. at 711.

The Board's supervisory determination will be upheld as long as it is supported by substantial evidence. *Beverly Ents.-Mass. v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999) ("*Beverly-Mass.*"); *Oil, Chemical and Atomic Workers Int'l*

Union, AFL-CIO v. NLRB, 445 F.2d 237, 241 (D.C. Cir. 1971) (supervisory determinations lie "squarely within the Board's ambit of expertise" and are "entitled to great weight"). In light of the fact that a determination of supervisory status may strip employees of their organizational rights, "particular caution is warranted before concluding that a worker is a supervisor." *Beverly-Mass.*, 165 F.3d at 963.

As we show below, Beverly failed to prove that the LPNs possessed the level of authority that confers supervisory status. To the extent that they participated in tasks typically reserved for supervisors, the record shows that their role was circumscribed, requiring no independent judgment, or that their authority was illusory. *Id.* at 962 ("'theoretical [or] paper power will not suffice' to make an individual a supervisor" (citation omitted)).

C. Beverly Failed to Prove that LPNs Exercised Supervisory Authority with Independent Judgment

At Haida, management included Administrator Formeck, the Director of Nursing (DON), Assistant Directors of Nursing (ADONs), and registered nurses (RNs). (A 59; 1276-77, 1444-45, 1453-54.) The RNs remained at the nurses' station and did not perform hands-on resident care. The LPNs administered medication and treatment to residents and did paperwork and charting. Certified nursing assistants (CNAs) performed basic resident care, including feeding and attending to hygiene needs. (A 59; 1289-91, 1423-25, 1430, 1445.)

There were three shifts for the nursing staff: 7 a.m. to 3:30 p.m. (days), 3:30 p.m. to 11:00 p.m. (second shift), and 11:00 p.m. to 7:00 a.m. (third shift). On the day shift, the administrator, DON, ADON, and RNs were on duty, as well as three LPNs and ten CNAs. On second shift, an ADON was on duty along with one RN charge nurse, three LPNs, and eight CNAs. On third shift, there was one RN, one LPN, and four CNAs. (A 59; 1419-21, 1426-29, 185-87.)

Beverly presented no evidence and does not contend here that the LPNs played any role in the transfer, layoff, recall, promotion, reward, and adjustment of grievances of employees. Of the remaining primary indicia[13] — assignment and direction of work; hiring; and discipline, suspensions, and discharge — Beverly failed to prove that the LPNs' involvement required the use of independent judgment.

1. Responsible Direction and Assignment of CNAs' Work

Beverly failed to show that the LPNs provided responsible direction to CNAs requiring the use of independent judgment. Rather, the LPNs served as mere conduits for information between RNs and CNAs. Specifically, at the beginning of the day, the RN prepared a grid sheet listing all residents with their

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[13] "Primary" indicia refer to the criteria listed in Section 2(11). "Secondary" indicia are factors that are considered, but are insufficient to establish supervisory status in the absence of primary indicia. *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1446 (9th Cir. 1991); *Billows Electric Supply*, 311 NLRB 878 n.2. (1993).

particular care requirements. Based on the RN's instructions, the LPNs conveyed the residents' needs to the CNAs, who decided on their own which residents they would care for. (A 62; 1291-93, 1301-06, 1316-19, 1341-43, 1362-65, 1390-91, 1396-98, 188-95.) The LPNs and CNAs spent their days doing hands-on resident care, completing spaces on the sheet and listing vital signs and other information for each resident as they went along. Sometimes, in order to finish paperwork, LPNs needed information from CNAs and, obviously, advised CNAs if they happened to observe improper techniques. The CNAs reported unusual conditions or problems to either the RN or the LPN, who either handled the situation or referred it to the RN. (A 62; 1293-99, 1306-07, 1320-23, 1343-44, 1365-66, 1391-93, 1438-40.) None of those activities performed by the LPNs are sufficient to confer supervisory status. *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) (rectifying errors required only routine, not independent, judgment); *Beverly Enterprises-Pennsylvania, Inc. v. NLRB*, 129 F.3d 1269, 1270 (D.C. Cir. 1997) (relaying of RNs' instructions and even monitoring of tasks is insufficient) ("*Beverly-Pennsylvania*"); *Ten Broeck Commons,* 320 NLRB 806, 811 (1996).

Rather, the real direction came from the RNs, who prepared the daily sheet listing the tasks for the LPNs and CNAs to accomplish.[14] *See Kentucky River*, 532 U.S. at 713-14 (detailed orders may reduce judgment below the statutory threshold); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). Moreover, any authority the LPNs had was necessarily limited, because a higher-ranking RN was always on duty. *See Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994) (individuals not supervisors where higher-level officials were always on call).

2. Hiring

Beverly does not contend that the LPNs' role in the hiring process involved independently hiring or effectively recommending hiring. In fact, its sole claim (Br 14-15 n.11, 44) is that the LPNs participated in a handful of interviews for CNAs. However, because the LPNs merely served as bystanders at those interviews — that is, ADONs or RNs also interviewed the applicants or restricted LPNs' questions to a prepared list — their involvement falls far short of that needed to confer supervisory status. (A 60; 1279-82, 1326-28, 1348-50, 1352,

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[14] Even if the LPNs were found to have assigned particular tasks to CNAs, the Supreme Court in *Kentucky River* drew a distinction between "directing the manner of others' performance of discrete *tasks* [and] employees who direct other *employees*," suggesting that the former is insufficient to confer supervisory status. 532 U.S. at 720 (emphasis in original).

1383-85, 1394-95.) *See Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1388 n.9 (1998) ("where supervisors . . . participate in the interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring within the meaning of Sec. 2(11)"); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989) (DON "independently investigated and interviewed the aides before making the ultimate hiring or firing decision"), *enforced*, 933 F.2d 626 (8th Cir. 1991). Indeed, Beverly cites no evidence that, following those interviews, any of the CNAs recommended for hire by the LPNs were, in fact, hired. In the circumstances, the Board was justified in finding (A 60) that the LPNs' participation in the hiring process "was little more than a sham." *See NLRB v. Harmon Industries, Inc.*, 565 F.2d 1047, 1050 (8th Cir. 1977).

3. Discipline, Suspensions, and Discharge

Similarly, although Beverly began to use LPNs in the disciplinary process during the strike (A 61; 1281-82, 1313-1314, 1324-25, 1393), the record belies any claim (Br 44 n.31) that LPNs effectively recommended discipline for CNAs or that their limited involvement reflected the use of independent judgment. In the

majority of instances, the LPNs did not initiate discipline.[15] Instead, they were instructed to participate merely as witnesses to the discipline or to issue the discipline based on a superior's decision. (A 61; 1324-39, 1345, 1353-58, 1386-89.) Other write-ups, most of which occurred after the strike, demonstrated significant involvement of the ADON and DON. (A 61; 409-30.) In these circumstances — that is, where the LPNs' role was limited to witness or messenger, or an RN or ADON was heavily involved in rewriting discipline or determining whether it was warranted — the Board reasonably found (A 61) that the LPNs' involvement in the disciplinary process was insufficient to confer supervisory status. *VIP Health Servs., Inc. v. NLRB*, 164 F.3d 644, 648 (D.C. Cir. 1999) ("mere reporting is insufficient to establish that [employees] effectively recommend discharge or discipline"); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989), *enforced*, 933 F.2d 626 (8th Cir. 1991).

4. Secondary Indicia

Having failed to show that the LPNs exercised with independent judgment any of the supervisory criteria listed in Section 2(11), Beverly relies on secondary

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[15] On the few occasions where LPNs reported CNAs' infractions to the ADON, they had to check with a superior to determine if the incident warranted discipline. They did not simply issue the discipline on their own, as true supervisors would.

indicia in an attempt to show that the LPNs are supervisors. As noted above, p. 31 n.13, those factors are insufficient, absent the exercise of any primary authority. Nonetheless, we address Beverly's contentions briefly.

The LPNs' role in evaluations (Br 14-15, 43) was limited at best. The ADON held ultimate responsibility for evaluations, writing several sections and comments, reviewing LPNs' comments, and sometimes requiring changes before approval. (A 60; 1283-87, 1336-38, 1345-47, 1366-72, 1374-82, 431-59.) *See, e.g., Marian Manor for the Aged & Infirm, Inc.*, 333 NLRB No. 133, slip op. at 4, 6 (2001) (managers reviewed appraisals and added comments). Moreover, the evaluations had *no* impact on CNAs' job status, including terminations, wages, benefits, and transfer requests, most of which were controlled by the CNAs' collective-bargaining agreement. (A 61 & n.60; 1432-33, 1459.) Under those circumstances, the LPNs' involvement in evaluations does not make them supervisors. *See Beverly-Pennsylvania*, 129 F.3d at 1270-71*; Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Lakeview Health Center*, 308 NLRB 75, 78 (1992).

The judge also aptly noted (A 62) many discrepancies between the LPNs' authority in job descriptions and in reality. (A 62-63; 172-84.) Contrary to Beverly's claim (Br 43-44), the Court considers the exercise, not the mere

possession, of supervisory authority to be controlling.[16] *Beverly-Mass.*, 165 F.3d at 962 ("'theoretical [or] paper power will not suffice'" (citation omitted)); *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 276 (D.C. Cir. 2001) (employer "must provide specific evidence that [the disputed employees] actually exercise supervisory authority"). Those discrepancies also cast doubt on the reliability of the entire document. *Adco Electric, Inc.*, 307 NLRB 1113 n.3 (1992), *enforced*, 6 F.3d 1110 (5th Cir. 1993).

D. Beverly's Remaining Arguments Lack Merit

Beverly's claim (Br 41-43) that the Board ignored or contravened *Kentucky River* is incorrect. *Kentucky River* merely rejected the Board's rule that the exercise of professional or technical judgment is not independent judgment. 532 U.S. at 714-20. Beverly misreads (Br 42-43) *Kentucky River* to hold that the exercise of any technical judgment automatically constitutes independent judgment and confers supervisory status. As discussed, the LPNs either did not exercise supervisory authority at all or their involvement did not require the use of independent judgment. *Kentucky River* explicitly left to the Board's discretion such determinations. 532 U.S. at 713. The judge did not rely on the now-

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[16] Beverly's reliance (Br 15) on an isolated instance of an LPN attending a strike preparation meeting hardly demonstrated a regular practice, and was contradicted by other LPNs' testimony. (A 60; 1287-88, 1315-16.)

prohibited distinction between technical and independent judgment and, therefore, the Board properly held (A 27-28 n.3) that *Kentucky River* did not change the analysis.

Beverly's reliance (Br 44-45) on the Sixth Circuit's unreported decision in *Beverly Health & Rehabilitation Servs. v. NLRB*, 181 F.3d 99 (6th Cir. 1999) (table), where the court determined that the LPNs at Haida were supervisors, is also misplaced. That case is distinguishable because the factual record and the procedural posture differed.

First, the record on which the 6th Circuit based its decision was generated in a separate Board representation proceeding, some 15 months *after* the unfair labor practices here. The Board therefore had no occasion to consider any evidence of subsequent developments introduced at the later hearing that may have affected the court's decision. Although it is impossible to glean from the Sixth Circuit's brief, unpublished opinion all the dispositive facts, several distinctions are apparent. For example, in the subsequent representation hearing, Beverly demonstrated that the LPNs transferred CNAs between wings, which the court found constituted responsible direction of CNAs. It also found that LPNs made effective recommendations of discipline and discharge that required "sensitive and nuanced judgments." *Id*. Those facts are not in the record in this earlier case.

Additionally, it is important to consider the procedural differences. The Board has long held, and the Supreme Court has now agreed, that the party asserting supervisory status must prove it. *Kentucky River*, 532 U.S. at 710-11. At the time of its decision involving the Haida LPNs, however, the Sixth Circuit held that the burden rested with the Board. *Beverly Health & Rehabilitation Servs. v. NLRB*, 181 F.3d 99 (6th Cir. 1999) (table). Certainly, the burden of proof was a critical, if not dispositive, factor in the outcome of the case. *Guenther v. Holmgreen*, 738 F.2d 879, 888 (7th Cir. 1984) ("the failure to carry a higher burden does not preclude a subsequent attempt to satisfy a lower standard"). Thus, the weight this Court accords to the Sixth Circuit's decision must account for the fact that that decision is based on a standard now recognized as erroneous.

Finally, although the Board was a party in the refusal-to-bargain case before the Sixth Circuit, it was a neutral adjudicator between the Union and Company, not a litigant, in the underlying representation case, and therefore was unable to present evidence. *See NLRB v. Bancroft Mfg. Co., Inc.*, 516 F.2d 436, 445-46 (5th Cir. 1975); *Ambox, Inc.*, 146 NLRB 1520, 1525 (1964) (General Counsel is "neutral in connection with presentation of the facts concerning the representation portion of the hearing"), *enforced*, 357 F.2d 138 (5th Cir. 1966). Here, in prosecuting the unfair labor practice charges, the Board's General Counsel was able to examine witnesses and introduce documents. To the extent that the Board

was not a litigant in the representation case, it was not a true party and should not be bound by that record.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT BEVERLY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY MAKING NUMEROUS UNILATERAL CHANGES TO EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT

In addition to the discrimination and coercive conduct described above, Beverly repeatedly imposed terms and conditions of employment on employees without giving the Union notice and an opportunity to bargain. The principles underlying Beverly's obligation to bargain are discussed below, followed by the specifics of the contested violations.

A. Applicable Principles

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to refuse to bargain in good faith with the representative of its employees. Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining as the parties' mutual obligation "to meet . . . and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . ." Bargaining is mandatory with respect to subjects that fall within that statutory language. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 365 U.S. 347, 349 (1958). An employer violates Section 8(a)(5) and (1) "if without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Financial Printing v. NLRB*, 501 U.S. 190, 198 (1991).

Accord Teamsters Local Union No. 639 v. NLRB, 924 F.2d 1078, 1084 (D.C. Cir. 1991).

B. Beverly Failed To Notify and Bargain with the Union Over Replacement Health Insurance

Beverly admits (Br 9) that, pursuant to a grievance settlement at the Clarion, Fayette, Franklin, Meadville, and York facilities, the Union's health insurance plan was an option for those employees in addition to Beverly's medical plan. The settlement stated that the union plan automatically terminated on November 30, 1995, absent an agreement to extend it.[17] (A 47; 291.)

On November 28, Union President Tom DeBruin received a letter from Beverly's Director of Associate Relations Wayne Chapman stating that the union plan terminated and that "we have secured HMO alternatives at each of these facilities effective January 1, 1996. Employees are being offered the alternative of the HMO or the Beverly Medical Plan." A list of the HMOs for each facility was included. (A 292.) On November 30, Beverly issued a memorandum to employees at Clarion stating:

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[17] The Board found the discontinuation of the union plan lawful, given the settlement language. (A 47.) Thus, only Beverly's failure to bargain over replacement insurance is at issue here.

> Please be advised that effective January 1, 1996 you will no longer have Insurance through the 1199P Health & Welfare Fund (medical/dental/ vision). Those eligible for insurance will be able to sign up for either the Beverly Plan (medical/dental/vision) or Keystone Health Plan West — a Blue Cross/Blue Shield HMO.

(A 297.) On December 4, Beverly sent the Union a letter setting forth costs and HMOs for all five facilities. (A 293-94.)

On December 5, the Union replied to Chapman's November 28 letter, protesting that Beverly's conduct was unlawful and requesting bargaining. (A 47; 295.) Chapman responded on December 11, reiterating that the union plan had terminated and that Beverly had already offered employees the HMO option.[18] (A 47; 296.) The record therefore shows that Beverly did not bargain over the introduction of HMO coverage to replace the union plan. *Oil, Chemical and Atomic Workers Int'l Union v. NLRB*, 547 F.2d 575, 582 n.6 (D.C. Cir. 1977) (insurance is a mandatory subject of bargaining).

Beverly's claim (Br 45) that it provided the Union with an opportunity to bargain is specious: Chapman admitted that Beverly had unilaterally chosen replacement HMO coverage and directly presented the HMO option to employees

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[18] Beverly cites (Br 10, A 158-59) Chapman's December 8 letter out of context. His December 11 letter is the response to DeBruin's *December 5* letter requesting bargaining. Chapman's December 8 letter responds to a *December 6* letter from DeBruin.

before notifying the Union.[19] Beverly's correspondence thus demonstrated not a proposal to be bargained over, but notification of a *fait accompli*, which is unlawful. *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

Beverly's suggestion (Br 46-47) that the Union waived its right to bargain lacks merit. A waiver of a statutory right must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982). Here, there was no such waiver. Moreover, the Union could not have waived its right to bargain where it had no meaningful notice or opportunity to bargain in the first place.[20] *Int'l Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) ("notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated"). *See also NLRB v. Roll & Hold Warehouse & Distrib. Corp.*, 162 F.3d 513, 519 (7th Cir. 1998) (rejecting waiver-by-inaction argument); *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1440-41 (9th

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[19] Beverly had chosen HMOs and planned employee meetings at least a week before notifying the Union. (A 1502-03, 1037-39.)

[20] Beverly's suggestion (Br 10, 46) that the Union was required to raise the HMO issue at December negotiations over the Blue Ridge and Camp Hill facilities is erroneous: those meetings were an inappropriate forum to negotiate HMO coverage for employees at other facilities.

Cir. 1995) (employer cannot assert waiver-by-inaction defense unless it shows that union had clear, advance notice of employer's intent to implement change).

C. Denial of Access to Union Representatives and Removal of Union Bulletin Boards

Beverly does not dispute (Br 11) that each of the collective-bargaining agreements grants union representatives reasonable access to individual facilities to meet with members and that, on December 7, 1995, Beverly's Chapman directed individual facilities to deny access to union representatives and to remove union bulletin boards. (A 47; 290.) It is also undisputed that most of the administrators followed Chapman's order.[21] Because providing union representatives access to the employer's facility, including bulletin boards, is a mandatory subject of bargaining, *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995); *Facet Ents., Inc. v. NLRB*, 907 F.2d 963, 983 (10th Cir. 1990); *NLRB v. Salvation Army of Mass.*, 763 F.2d 1, 8 n.9 (1st Cir. 1985), Beverly violated Section 8(a)(5) and (1) of the Act by making those changes to existing terms without bargaining to impasse.

Beverly argues (Br 30-34) that its conduct was lawful because (1) the Union's right of access expired with the contract, and (2) even if it did not,

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[21] The Board found no violations regarding denial of access at Clarion, Franklin, Meyersdale, Murray, or Lancaster, or regarding the bulletin boards at Meadville, Mt. Lebanon, Blue Ridge, or Carpenter. (A 47.)

Beverly's property rights trump the Union's representational rights. Both arguments must be rejected, because they are contrary to precedent and contravene the policies of the Act.

First, it is well established that contractually established union access, like most of the other provisions of a collective-bargaining agreement, becomes a term and condition of employment that survives the expiration of the collective-bargaining agreement.[22] *See, e.g., NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995) (post-expiration denial of access); *NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 402-03 (5th Cir. 1984); *Pioneer Press*, 297 NLRB 972, 987-88 (1990) (post-expiration elimination of bulletin board).

Beverly's argument (Br 30-34) that the Board's analysis of the violation is inconsistent with the Supreme Court's *Lechmere* decision (*Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)) is completely meritless. *Lechmere* held that an employer has the right to exclude from his property all nonemployees, including union officials engaged in organizing activity, unless the union lacks an alternative means of communicating with the employees or the employer discriminatorily grants access. *Id.* at 538. In so holding, the Court rejected the Board's view, that a

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[22] Terms and conditions of employment continue after expiration, not by virtue of the contract, but because the Act requires their continuation in order to maintain stable bargaining relationships. *Litton Financial Printing v. NLRB*, 501 U.S. 190,

union engaged in organizing activity had the statutory right, in certain circumstances, to trespass in order to communicate with employees. *Id.* at 537-38. The Court did not consider, much less reject, the rule that an incumbent union's *contractually based* right of access, like most other provisions of a collective-bargaining agreement, remains a term and condition of employment after the agreement's expiration. Beverly's assertion (Br 32-33) that the Board's rule concerning contractually based access has not been reaffirmed post-*Lechmere* is flatly wrong. *See NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995) ("A contractual provision for Union access . . . is a term and condition of employment that survives the expiration of the contract").[23]

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206 (1991). *Accord Edward S. Quirk*, 330 NLRB No. 137 (2000), *enforcement denied on other grounds*, 241 F.3d 41 (1st Cir. 2001).

[23] The unfair labor practice in *Unbelievable* was essentially identical to that here: the employer refused to grant access to union representatives with a right of access based on an expired contract. In its decision, the court granted the Board's Rule 38 motion for sanctions, deeming the employer's arguments "wholly without merit" and stating that "this entire appeal was frivolous." *Id.* at 1441.

Beverly's cause is not advanced by its reliance on this Court's decision in *United Food and Commercial Workers Local 880 v. NLRB*, 74 F.3d 292 (1996). That case, regarding *Lechmere*, concerned a Board determination that nonemployees associated with a union had a statutory right to trespass on retail property in order to handbill the employer's customers. *Id.* at 298. The union did not represent the employees and the Board's theory had nothing to do with contractually created access rights.

D. The Management Rights Clauses Expired with the Collective-Bargaining Agreements and Cannot Excuse Numerous Unilateral Changes

In addition to the changes described above, Beverly has not contested the Board's findings that it made myriad other changes to mandatory subjects of bargaining without reaching impasse.[24] Instead, it contends (Br 34-41), contrary to established precedent, that management rights clauses in the collective-bargaining agreements allowed the changes and remained in effect after contract expiration, as a matter of law.[25]

As described above, a waiver of the right to bargain must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Applying that principle to the *duration*, as well as the scope, of a waiver, the Board and courts repeatedly have held that a waiver of collective-bargaining rights

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[24] Although the facts of numerous unilateral changes, listed at pp. 5-6 n.3 of Beverly's brief, are undisputed, Beverly contends that those changes were permissible under the expired management rights clauses. It overreaches, however, in contending (Br 5-6 n.3) that other "management rights-type" violations or violations "connected" to management rights also should be dismissed should that defense prevail. The Board made no such connection. (A 28-30, 28-29.) Beverly provided no other support or argument regarding those issues and, therefore, waived them. *Verizon Telephone Cos. v. FCC*, 292 F.3d 903, 911-12 (D.C. Cir. 2002) (arguments not raised in opening brief are waived); *Int'l Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1487 (D.C. Cir. 1994) (refusing to address unsupported, skeletal argument); Fed.R.App.P. Rule 28(a)(9)(A).

[25] The relevant clauses in the expired contracts provided that Beverly retained the right to control a list of specified terms such as scheduling, rules, and methods of operation. (Br 11-12, A 244-89.) Thus, the Union waived its right to bargain over those topics during the term of the contract.

contained in a management rights clause does not survive the expiration of the contract, absent a clear indication that the parties intended it to do so. (A 28-29.) *Beverly Health & Rehabilitation Servs., Inc. v. NLRB*, 297 F.3d 468 (6th Cir. 2002); *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1245 (3d Cir. 1994); *Presbyterian University Hospital*, 325 NLRB 443, 443 n.2 (1998), *enforced mem.*, 182 F.3d 904 (3d Cir. 1999); *Buck Creek Coal*, 310 NLRB 1240 (1993); *U.S. Can Co.*, 305 NLRB 1127, 1127 (1992), *enforced*, 984 F.2d 864 (7th Cir. 1993); *Control Services, Inc.*, 303 NLRB 481, 484 (1991), *enforced mem.*, 961 F.2d 1568 (3d Cir. 1992); *Holiday Inn of Victorville*, 284 NLRB 916 (1987).

Beverly nevertheless claims (Br 35-41) that those cases are inconsistent with the "*Shell Oil* line of cases" purportedly holding that management rights clauses survive expiration. *See Shell Oil*, 149 NLRB 283 (1964). The Sixth Circuit just recently rejected that argument in another Beverly case. *Beverly Health and Rehabilitation Servs., Inc. v. NLRB*, 297 F.3d 468 (6th Cir. 2002). It concluded that the series of cases holding that a management rights clause is a waiver that expires with the contract was not a departure from *Shell Oil*, and was a reasonable interpretation of the Act promoting stable bargaining relationships.[26] *Id.* at 481-83

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[26] There is no merit to Beverly's suggestion (Br 40-41) that, in the instant case, the Board recognized a split in the case law. The Board stated that "to the extent that certain earlier cases . . . could be read to imply [that management rights clauses survive expiration], those cases have been overruled sub silentio by the more

& n.2. The court held that the *Shell Oil* line allowed unilateral changes under an expired management rights clause only "if an employer has frequently engaged in a pattern of unilateral change under the management-rights clause during the term of the [contract] . . . ." *Id.* at 481.

The Sixth Circuit's decision precludes the Court from finding that management rights clauses automatically survive contract expiration. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) (prior judgment forecloses relitigation). This case easily meets the Court's requirements for issue preclusion: (1) the same issue was contested by the parties and submitted for judicial determination in the prior case, (2) the issue was determined by a court of competent jurisdiction, and (3) preclusion does not work a basic unfairness to Beverly, which had the full opportunity, and did, raise the same arguments as here.[27] *Hall v. Clinton*, 285 F.3d 74, 80 (D.C. Cir. 2002).

Furthermore, aside from the survivability of management rights clauses as a matter of law, Beverly has waived any claim under the Sixth Circuit's alternate

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recent cases cited . . . ." (A 28 n.6.) The obvious meaning of that statement is that, even assuming *arguendo* Beverly's reading of those cases, subsequent cases have overruled that view. The Sixth Circuit rejected Beverly's claim, made in a 28(j) letter and at argument, that the Board may not overrule cases *sub silentio*.

[27] The relevant facts were also identical, including the language of the management rights clauses. Indeed, each party was represented by the same counsel in the Sixth Circuit.

rationale, that the clause survives where the employer has established a pattern of frequent exercise of its rights during the term of the contract. In its opening brief, Beverly made no past practice claim and cited no evidence of prior unilateral changes made under the clause, much less a frequent pattern of doing so. *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (arguments not raised in opening brief are waived); *Int'l Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1487 (D.C. Cir. 1994) (refusing to address unsupported, skeletal argument); Fed.R.App.P. Rule 28(a)(9)(A); *Eugene Iovine, Inc.*, 328 NLRB 294, 294-95 n.2 (1999) (employer must prove affirmative defense that unilateral change was consistent with past practice), *enforced mem.*, 242 F.3d 366 (2d Cir. 2001). Where Beverly's counsel in this case also represented it before the Sixth Circuit and was fully aware of the past practice issue, raised there in the briefs and at argument, the inescapable conclusion is that Beverly abandoned that argument here.

Finally, there is no merit to Beverly's related argument (Br 39), relying on *NLRB v. United States Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993), that, where a waiver is in writing, a party is deemed to have exercised its bargaining rights and the question of waiver is irrelevant. In that case, this Court stated "there is no continuous duty to bargain *during the term* of an agreement with respect to a matter covered by the contract." *Id.* (emphasis added). Beverly's attempt to

discard that explicit limitation would infinitely bind a party to a waiver. Furthermore, *Postal Service* privileges an employer's changes within a framework where it honors its other contractual obligations. *Id.* at 838. *See Capitol Steel & Iron Co. v. NLRB*, 89 F.3d 692, 696-97 (10th Cir. 1996) (employer undermined union bargaining rights by granting raises under a contractual increase provision during negotiations). Here, Beverly's numerous bargaining and other violations foreclose it from relying on *Postal Service*.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT BEVERLY VIOLATED SECTION 8(a)(1) OF THE ACT BY VIDEOTAPING PICKETERS AND BY ADVERTISING FOR REPLACEMENT EMPLOYEES AT HIGHER THAN EXISTING WAGES

Beverly admits (Br 16, 48) that it videotaped employees who were picketing at its Fayette facility, and that such conduct is generally considered coercive and therefore unlawful under Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)).[28] (A 52; 1221-26, 1228-32.) Its only defense (Br 48) — that it erroneously suspected that the picketers were trespassing — has consistently been rejected.

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[28] Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." Section 7 of the Act (29 U.S.C. § 157) grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . ."

See, e.g., Sonoma Mission Inn & Spa, 322 NLRB 898, 902-03 (1997) (fear of trespass insufficient); *Casa San Miguel, Inc.*, 320 NLRB 534, 538 (1995).

Beverly also admits (Br 17) that it offered to pay replacement employees higher wages than those paid to employees who struck. *Workroom for Designers, Inc.*, 274 NLRB 840, 855-56 (1985) (advertising for replacements at higher wages violated Section 8(a)(1)). The cases it cites (Br 49) in its defense are inapposite: they merely hold that an employer need not bargain over replacements' terms and conditions of employment given the impracticality of negotiating in the face of a looming or ongoing strike. The Board reasonably distinguished (A 30 & n.18) those cases, finding here that the publicized offer of higher wages to replacements, in conjunction with myriad other unfair labor practices, was designed to undermine the Union and therefore interfered with employees exercising their Section 7 rights. Beverly offers no support for its speculation (Br 50) that offering higher wage rates was necessary to attract applicants.

VI. THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN ORDERING CORPORATEWIDE RELIEF

The Board ordered Beverly to cease and desist from violating the Act on a corporatewide basis, and to post one of two remedial notices to employees at all of its facilities. The purpose of that order is to redress the scores of violations in this case and to rein in Beverly's propensity to violate the Act.

A. Applicable Principles and Standard of Review

Section 10(c) of the Act (29 U.S.C. § 160(c)) directs the Board, if it finds that "any person . . . has engaged in . . . [an] unfair labor practice," to "issue . . . an order requiring such person to cease and desist from such unfair labor practice . . . ." *See United Steelworkers of America v. NLRB*, 646 F.2d 616, 629 (D.C. Cir. 1981) ("*Steelworkers*"). A remedial notice to employees always accompanies Board cease-and-desist orders. *See, e.g., Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 52 (1935). *See also May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 390 (1945) (test of proper scope of cease-and-desist order is whether it was necessary to prevent further unfair labor practices). Courts have endorsed the Board's imposition of corporatewide cease-and-desist and notice-posting orders where past conduct predicts future violations. *See, e.g., Steelworkers*, 646 F.2d at 640; *Beverly II-III*, 227 F.3d at 828; *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 688 (4th Cir. 1980); *Florida Steel Corp.*, 222 NLRB 955, 956 (1976), *enforced mem.*, 536 F.2d 1385 (5th Cir. 1976).

The Board's remedial power "is a broad discretionary one, subject to limited judicial review." *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord Steelworkers*, 646 F.2d at 629. Its remedy, therefore, should not be overturned unless it is "shown that the order is a patent attempt to achieve ends other than

those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

B. The Instant Case Warrants Corporatewide Relief

Beverly's history of violating the Act is well established. Its continued misconduct therefore warrants a remedy that goes beyond the individual violations. Moreover, the fact that Beverly's union animus as well as the unfair labor practices here emanated from the top of its corporate structure justifies a remedy that is directed at the root of the problem via corporatewide, rather than facility-specific, relief. The severity of those violations also supports the need for corporatewide relief.

1. Beverly's Record of Pervasive Unfair Labor Practices

Based on *Beverly I*, *II*, and *III*, and the record here, the Board reasonably found (A 32) that Beverly "continues to have a proclivity to violate the Act; that its widespread misconduct demonstrates a general disregard for its employees' Section 7 rights; and that, absent a corporatewide remedy, the Respondent is likely to commit such unlawful actions at its other facilities against other employees." By the point of this fourth consolidated case, Beverly's pattern of egregious

misconduct is patently obvious: it is a recidivist violator of the Act.[29] As described above, Beverly committed some 240 violations of the Act in *Beverly I, II,* and *III.* Here, Beverly adds almost 100 more violations, at least one of which — the refusal to reinstate strikers — directly affected hundreds of employees. And it continues to flout the Act.[30] As this Court has recognized, "some 'stronger medicine' is necessary to effectuate the policies of the Act in cases of recidivist violators" such as Beverly. *Steelworkers*, 646 F.2d at 630.

2. Central Control of Labor Policy

Beverly does not contest the Board's finding (A 80-83) that the corporation, its individual nursing homes, regional offices, and subsidiaries constituted a single employer, and that it maintained central control of labor relations.[31] *See Beverly II-III*, 227 F.3d at 828, 847 (regional and corporate direction of unified labor relations policy). Entities that constitute a single employer are collectively liable

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[29] In addition to the consolidated cases, there are a number of miscellaneous decisions involving various Beverly facilities located around the country. See A 82 n.27.

[30] On March 23, 2000, an administrative law judge issued a decision (*Beverly V*) finding that Beverly committed numerous further violations of Sections 8(a)(1), (3), and (5) of the Act, warranting a similar corporatewide order. 2000 WL 33664139. That decision currently is pending before the Board.

[31] The Board looks to four principal factors in finding a single employer: common ownership or financial control, common management, functional interrelation of operations, and centralized control of labor relations. *Radio & Television Broadcast Technicians, Local Union 1264 v. Broadcast Service of Mobile, Inc.*,

for the unlawful conduct of the individual parts. *See, e.g., Package Service Co. v. NLRB*, 113 F.3d 845, 847 (8th Cir. 1997). Moreover, evidence introduced at the supplemental hearing in this case demonstrated that the unfair labor practices were not the work of maverick local officials, but reflected Beverly's systemic and entrenched union animus. The Board reasonably considered those facts in deciding to impose a corporatewide order.

Beverly maintained strict corporate and regional control of facilities' labor relations. Senior Vice-President of Labor and Employment, Donald Dotson, provided substantial guidance on and oversight of labor issues. For example, seminars conducted by Dotson and Beverly's president and legal staff included training on unfair labor practices and nurse supervisory issues. (A 78; 1206-08, SA 15-26, A 1544-47, 309-332, 565-757, 776-77, 779-810.) Dotson required regional directors to send him copies of Section 8(g) strike notices and reports of leafleting and picketing. Beverly also centrally controlled facilities' preparation for the strike and picketing. (A 78; 1163-64, 1170-72, 1188-97, 1218-20, 1244-46, 1457-58, 1462-63, 1466-67, 1473-75, 1484-86, 1493-96, 1527-28, 1535, SA 29, A 301-08, 333-40, 460-67, 564, **77**4-75, 1044-45, 196.)

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380 U.S. 255, 256 (1965); *Local 677 Int'l Union of Operating Engineers, AFL-CIO v. NLRB*, 595 F.2d 844, 847 n.9 (D.C. Cir. 1979).

Designated corporate officials handled all contract negotiations and information requests from the Union. (A 79; 870.) Dotson required advance notice of contract expiration with comments on anticipated issues from regional officials. Corporate legal counsel provided advice and ensured uniform responses during negotiations. Dotson's office reviewed and maintained agreements. (A 78; 1519-26, 1536-37, 758-773.) In this case, regional Director of Associate Relations Chapman developed a "master" Pennsylvania Labor Relations Plan for negotiations that Vice-President Claude Lee and Dotson reviewed, with copies to in-house counsel and the president. Corporate, regional, and local managers met to discuss negotiations. (A 79; 1495-97, 1514, 1046-52.) Beverly admits (Br 51) that regional officials also circumscribed facility administrators' role in contract administration including grievances and information requests. (A 79; 1058-1112.)[32]

Beverly's centralized control over labor relations ensured that facility administrators uniformly implemented the corporate desire to "operate facilities without the necessity of union representation." (A 78; 710.) In those circumstances, the Board's corporatewide remedy reasonably addressed unfair

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[32] The record contains countless other examples of centralized control. See A 71-72, 74-81.

labor practices committed pursuant to corporate and regional direction and policies. As the Seventh Circuit aptly stated in *Beverly II-III*:

> when an employer has many different facilities, all of which are affected by the same general policies, the Board is not required to proceed facility-by-facility, waiting for the next shoe, and the next shoe, to drop. It can instead require the company as a whole to eliminate the policies that lead to the commission of unfair labor practices by managers lower down on the corporate ladder.

227 F.3d at 828. *See also NLRB v. S.E. Nichols*, 962 F.2d 952, 960-61 (2d Cir. 1988).

3. Involvement of Corporate and Regional Offices in Particular Unfair Labor Practices

In addition to their influence over general policies, Beverly's corporate and regional officials played a significant role in a number of particular unfair labor practices in this case. (A 81.) For example, Beverly's corporate legal team and Senior Vice-President Dotson formulated its position on the Section 8(g) strike notices and decision not to reinstate striking employees. Chapman, Lee, and other regional personnel conveyed those decisions to facility managers, even drafting advertisements for replacement employees. Obviously, facility administrators lacked the expertise and authority to make legal determinations that would subject Beverly to significant backpay liability. (A 79-81; 1166-71, 1183-87, SA 7-9, A 1199-1205, 1210-1217, 1233-40, 1249-51, 1468-71, 1477-84, SA 11-12, A 1498-1500, 1527-31, 1538-41, 341, 363-75, 468-563, 778, 1053-57.) They also could

not determine whether management rights clauses expired with the contracts. Indeed, Beverly admits (Br 52, n.35) that Chapman directed facilities to deny access to union representatives and remove union bulletin boards after consultation with corporate legal counsel, Dotson, and Lee. (A 47; 1516-17, 1531-34, 290.)

Beverly committed numerous other violations (Br 5 n.3) based on the national implementation of a new incontinence program. (A 28, 48; SA 1-6, SA 13-14, SA 57-59.) Beverly admits (Br 51) that regional officers were responsible for the multiple refusals to provide information to the Union and refusals to process grievances. They also refused to bargain over replacement HMO coverage, arranged by corporate officials, at five facilities. (A 47, 52; 1502-03, 292-97, 1037-39.)

Beverly's corporate fervor to make LPNs supervisors and thus strip them of bargaining rights also caused multiple unfair labor practices. The regional office prepared new job descriptions for LPNs at Fayette and Monroeville that unlawfully converted them to supervisors. (A 56; 1241-43, 1544-46, 1548, 342-62, 779-814.) Chapman prohibited Haida LPNs' discussion of the Union and wearing union insignia that also led to the unlawful discharges of two employees. He also

approved the suspension of LPN Connie Kollar.[33] (A 58-59; 1252-69, 1271-76, 1308-1311, 376-408.)

4. The Severity of Beverly's Misconduct Supports the Need for Corporatewide Relief

The severity of the violations here also supports the imposition of a corporatewide order. Beverly's refusal to reinstate hundreds of striking employees is tantamount to discharging them. It also committed numerous Section 8(a)(5) violations that "struck at the heart of the collective bargaining relationship." *Beverly II-III*, 227 F.3d at 847. Beverly stripped LPNs of their collective-bargaining rights by unlawfully converting them to supervisors. It discriminated against employees on many occasions by disciplining, suspending, and terminating them because of their union activity. Beverly coerced employees on numerous occasions, including surveilling their union activity and threatening them, and prohibiting them from discussing or openly supporting the Union. Thus, the number and severity of the violations also support the Board's determination that corporatewide relief is necessary.[34] *See Beverly II-III*, 227 F.3d at 847.

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[33] Regions were directed to obtain legal advice for discharges in the context of union activity. (A 1542-43.)

[34] There is no merit to Beverly's suggestion (Br 51) that, in the event that the Court denies enforcement of any of the contested findings, it should remand the case to the Board to reconsider the appropriateness of corporatewide relief. Remand is unnecessary where its past history and uncontested violations — including myriad bargaining violations and unilateral changes, coercive statements, and instances of

C. Beverly's Contentions Lack Merit

Beverly's argument (Br 53) that the remedy be limited to addressing the "effects" and "consequences" of particular violations ignores its pattern of misconduct and the need for deterrence. By its conduct, Beverly has demonstrated that traditional remedies alone no longer suffice. As the Seventh Circuit observed, "the time was past for piecemeal relief." *Beverly II-III*, 227 F.3d at 847.

Beverly's related argument (Br 53) — that employees working at facilities where no violations occurred should not be notified of its misconduct — ignores the remedy's deterrent purpose. As the Board found (A 34), Beverly's corporatewide propensity to violate the Act rendered location irrelevant. A corporatewide notice also improves local managers' knowledge of the Act and facilities' compliance. Additionally, it advises employees of the corporatewide cease-and-desist order, educates them about their rights and protections under the Act, and informs them that violations have and will be remedied. Given Beverly's corporate environment, the Board reasonably refused (A 34) to assume that the violations had no significance at other facilities.

Finally, Beverly's suggestion (Br 53-54) that the order here is cumulative, given the corporatewide order in *Beverly II-III*, is unavailing. Courts have

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discrimination — alone warrant corporatewide relief, particularly in light of Beverly's continued penchant for violating the Act.

enforced corporatewide orders despite prior similar orders in a short time span where the employer continues to violate the Act. *See J.P Stevens & Co. v. NLRB*, 638 F.2d 676 (4th Cir. 1980); *J.P Stevens & Co. v. NLRB*, 623 F.2d 322 (4th Cir. 1980); *J.P Stevens & Co. v. NLRB*, 612 F.2d 881 (4th Cir. 1980). *See also Florida Steel Corp. v. NLRB*, 620 F.2d 79 (5th Cir. 1980); *Florida Steel Corp. v. NLRB*, 601 F.2d 125 (4th Cir. 1979); *Florida Steel Corp.*, 222 NLRB 955, 956 (1976), *enforced mem.*, 536 F.2d 1385 (5th Cir. 1976). Beverly's labeling of the corporatewide order as "punitive" (Br 54) has been rejected by the Court, which recognized the "danger that purely 'compensatory' remedies may fail in some cases to effectuate fully the purposes of the Act." *Steelworkers*, 646 F.2d at 630 ("[w]e believe it is wise to . . . not get caught up in a semantic debate between what is 'remedial' and what is 'punitive.'"). Moreover, Beverly cannot use its own continuing misconduct as a rationale for a reduced remedy in subsequent cases. Indeed, it shows no sign of reform (A 31 n.24) and does not even claim here that it has changed, or is attempting to change, its ways.[35]

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[35] Beverly's argument (Br 54-55) that the order to mail notices to employees of closed facilities is overbroad is better advanced in post-appeal compliance proceedings. For example, in *Beverly II-III*'s compliance stage, the Board agreed to waive notices for closed facilities where no violations occurred due to logistical difficulties in locating those employees. Also, the notice likely will be posted at far fewer than 950 facilities as Beverly claims (Br 2, 3). See p. 6 n.5.

CONCLUSION

The Board respectfully requests that the Court enter judgment denying Beverly's petition for review and enforcing the Board's order in full.

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